

**UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords IV)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

**ORDER DENYING AMAZON’S MOTION TO STRIKE
TESTIMONY CONCERNING THE [REDACTED]**

On May 5, 2022, Amazon.com Services LLC (Amazon) filed a motion (Motion) requesting that the Copyright Royalty Judges (Judges) strike the portions of Copyright Owners’ Written Rebuttal Statement (WRS) that rely on Amazon’s [REDACTED] or in the alternative, to permit supplemental testimony. Copyright Owners filed an Opposition on May 19, 2022. Amazon replied on May 26, 2022.

Amazon states that [REDACTED]

[REDACTED] Motion at 1. According to Amazon, [REDACTED] but now Copyright Owners [REDACTED] from David Kokakis, UMPG’s Chief Counsel, and from Dr. Jeffrey Eisenach. *Id.* Amazon acknowledges that Mr. Kokakis referenced Amazon exhibits that, from Mr. Kokakis’s perspective, [REDACTED] Motion at 7, quoting Kokakis WRT ¶ 21.¹ According to Amazon, Dr. Eisenach repeatedly cites [REDACTED] which, admittedly, appeared in Amazon’s unredacted exhibits. Motion at 8. Dr. Eisenach also purportedly relies on Mr. Kokakis’s [REDACTED] to discredit Amazon’s rate proposal and [REDACTED] and to support Dr. Eisenach’s opinion that [REDACTED] *Id.*

Amazon argues that because Copyright Owners’ WRS violated the terms of the [REDACTED] the Judges should strike the testimony [REDACTED] Motion at 13. According to Amazon, where parties contract to exclude evidence from a civil

¹ Amazon attempted, unsuccessfully, to shield from discovery its unredacted exhibits that referenced [REDACTED]. See Order on Copyright Owners’ Motion to Compel Amazon to Produce Unredacted Documents and Challenge Clawback Notice (May 27, 2022).

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proceeding, courts hold them to their agreement. *Id.*, citing, among others, *Radio Music License Committee, Inc v. Global Music Rts., LLC*, 2019 WL 1437981 (E.D. Pa. Mar. 29, 2019).

Amazon contends that [REDACTED] created a situation similar to cases involving settlements or evidentiary stipulations. *Id.* at 15. Amazon believes that the Judges have authority to enforce the [REDACTED] against Copyright Owners, just as they would have authority to enforce an evidentiary stipulation. In the alternative, Amazon requests that the Judges permit it to submit supplemental testimony from James Duffett-Smith, which, according to Amazon, explains [REDACTED]

Id. at 16.

In their Opposition, Copyright Owners opine that the Judges have no jurisdiction over Amazon's [REDACTED] and the agreements at issue provide for exclusive jurisdiction in the courts of New York.² Opposition at 1. Copyright Owners also note that NMPA and the Nashville Songwriters Association International are not parties to the contracts and could not [REDACTED] to which they never agreed. *Id.* Copyright Owners accuse Amazon of attempting to suppress proper rebuttal and impeachment evidence, the introduction of which is not impermissible under [REDACTED] *Id.* at 1-2. Copyright Owners contend that Amazon's motion is an attempt to suppress evidence of [REDACTED] which is far higher than the rate that Amazon has proposed as a benchmark. *Id.* at 3-5.

Copyright Owners represent that the WRS did not offer [REDACTED] as a benchmark but rather used [REDACTED] and referenced Amazon's own unredacted exhibits, which, according to Copyright Owners, provide [REDACTED] of Amazon's proffered benchmark rate. *Id.* at 5. Copyright Owners contend that their actions did not breach [REDACTED] *Id.* Copyright Owners assert that the position Amazon takes with respect to what is and is not permitted under the Protective Order with respect to confidential license agreements is inconsistent, favoring a more restrictive view when it applies to Copyright Owners' witnesses and a less restrictive view when it applies to its own. *See id.* at 5-6 (alleging Amazon [REDACTED]). Copyright Owners request that if the Judges permit Mr. Duffett-Smith to submit supplemental written direct testimony, they should also allow Mr. Kokakis to submit supplemental written rebuttal testimony. *Id.* at 6.

Further, Copyright Owners assert that they did not agree to refrain from using [REDACTED] in rebuttal or for impeachment purposes. *See* Opposition at 2, Declaration of Marion Harris, Ex. A (Copyright Owners make assertion in email string; Amazon does not

² Amazon acknowledges that [REDACTED] are governed by New York law and contends that NMPA should be viewed as an agent for its members, such as [REDACTED], which [REDACTED]

[REDACTED] Reply at 5. Amazon argues that the Judges' statutory authority to grant Amazon's requested relief rests on the Judges' obligation under the Copyright Act to issue determinations that are supported by the written record and by their authority to promulgate regulations that govern the development of that record. Reply at 6, citing 17 U.S.C. § 803(b)(6)(A), (c)(3) and 37 C.F.R. §§ 351.4-351.6, 351.9-351.12.

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appear to agree to Copyright Owners' assertions). In any event, Copyright Owners contend that their use of information derived from [REDACTED] is permissible because it is offered to rebut directly Amazon's WDS, specifically the testimony of Dr. Marx and Mr. Duffett-Smith.

Ruling

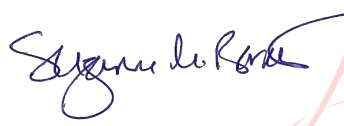
The Judges **DENY** the Motion.

Amazon put the terms of the subject [REDACTED] directly at issue in the formulation of its rate proposal and by the use of information derived from [REDACTED] in its WDS. The Judges **DENY** Amazon's request to submit supplemental testimony.

Further, the Judges find that the [REDACTED] designate New York as the appropriate governing law and forum for contract interpretation and enforcement.

Within ten days of the date of issuance of this Restricted Order, the affected parties shall file an agreed redacted version for public viewing.

SO ORDERED.

 Digitally signed by
Suzanne Barnett
Date: 2022.06.23
16:03:22 -04'00'

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: June 23, 2022